

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
June 23, 2008 Session

McKEE FOODS CORPORATION ET AL. v. JAMES M. BUMPUS

**Direct Appeal from the Circuit Court for Sumner County
No. 25279 C.L. Rogers, Judge**

**No. M2007-02467-WC-R3-WC - Mailed - October 3, 2008
Filed - December 1, 2008**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. The employee, James Bumpus, appeals the trial court's ruling that his sternal non-union following open-heart surgery was a non-compensable injury because it was caused by over fifty years of heavy smoking and a chronic cough rather than work-related activities. Mr. Bumpus also appeals the trial court's ruling that work-related activities did not cause an actual advancement or progression of his pre-existing condition. We find that the evidence does not preponderate against the trial court's ruling, and affirm the judgment.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right; Judgment of the Circuit Court Affirmed

WALTER C. KURTZ, SR. J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., J., and JON KERRY BLACKWOOD, SR. J., joined.

Richard A. Schulman, Chattanooga, Tennessee, for the appellant, James M. Bumpus.

J. Bartlett Quinn and Charles D. Lawson, Chattanooga, Tennessee, for the appellee, McKee Foods Corporation.

Robert E. Cooper, Jr., Attorney General and Reporter, and Juan G. Villaseñor, Assistant Attorney General, for the appellee, Second Injury Fund.

MEMORANDUM OPINION

Factual and Procedural Background

James M. Bumpus began working for McKee Foods Corporation, a bakery, in 1986 as a truck driver. Mr. Bumpus's job duties included hooking-up to and driving a truck and trailer as well as unloading thirty to thirty-five pound boxes of snack cakes into warehouses on his route. In July 2000, Mr. Bumpus suffered a heart attack, which was not related to his work, and was required to undergo a triple coronary artery bypass surgery. Dr. W. Randy Carter performed the procedure, which required an incision splitting the sternum to reach the heart. Mr. Bumpus's sternum was closed using stainless steel wires. He remained off work to recover for approximately two months and returned to work without restrictions in September 2000.

In January 2001, while unloading a bundle of cardboard from his truck, Mr. Bumpus felt a painful pop in his chest. He notified McKee Foods and scheduled an appointment with Dr. Carter, the physician who performed his triple bypass surgery. Dr. Carter performed an x-ray and discovered that two of the stainless steel sternal wires were fractured. On March 5, 2001, Dr. Carter performed a sternal rewiring using a Robicsek weave, which allow the sternal wires to pull against each other giving added strength. After the sternal rewiring, Dr. Carter diagnosed Mr. Bumpus with sternal click, i.e., failure of the sternum to heal, and restricted him from work. On July 31, 2001, Dr. Carter again released him to return to work without restrictions.

In June 2003, while unloading his truck at a warehouse, Mr. Bumpus felt a sharp pain in his chest and discovered a knot at the base of his sternum. He notified McKee Foods and scheduled an appointment with Dr. Carter. Dr. Carter performed an x-ray and found that Mr. Bumpus had broken the Robicsek weave. Dr. Carter placed him on a temporary 20 pound lifting restriction and performed a second sternal rewiring on September 17, 2003. At the second rewiring, Dr. Carter diagnosed that Mr. Bumpus's sternal click had progressed to sternal movement, which allows the sternum to move when he coughs. Mr. Bumpus never returned to work after the June 2003 incident. It is the June 30, 2003, incident that is the subject of this lawsuit.¹

In January 2005, Dr. Carter performed a third sternal rewiring after Mr. Bumpus broke yet another Robicsek weave. This breaking of the sternal wires did not occur while Mr. Bumpus was performing work-related activities.

Dr. Carter testified that Mr. Bumpus's sternal non-union is a permanent condition, and Mr. Bumpus has a permanent restriction from lifting more than five or ten pounds. He also has a permanent restriction from twisting. Dr. Carter further stated that Mr. Bumpus has reached maximum medical improvement. Dr. Carter opined that the probable cause of his sternal non-union was "multi-factorial." On direct examination, Dr. Carter stated that the repetitive weight lifting and twisting Mr. Bumpus engaged in while unloading his truck could be the cause of the non-union. However, on cross-examination, Dr. Carter stated that Mr. Bumpus's smoking habit and chronic cough increased his predisposition to sternal non-union and could have been a contributing cause.

¹ The complaint was filed March 16, 2004. The trial was held in August 2007. Final judgment was entered in the trial court on October 15, 2007.

At trial, Mr. Bumpus testified that he began smoking cigarettes when a child and, at the time of his heart attack in 2000, he smoked two to three packs of cigarettes a day. He also testified that he had continued to smoke despite instructions from Dr. Carter to stop. In 2005, Mr. Bumpus smoked one pack of cigarettes every two days.

McKee Foods retained Dr. Roy DeHart, an occupational medicine specialist employed by Vanderbilt University Medical Center, to conduct a review of Mr. Bumpus' medical records. Dr. DeHart testified that Mr. Bumpus' condition was not the first of its type that he had seen. Dr. DeHart testified that he conducted a study of the literature in the field of thoracic medicine, including several peer-reviewed journals. He stated that this literature lists up to ten potential causes of sternal non-union following surgery, including smoking and Chronic Obstructive Pulmonary Disorder ("COPD"), the chronic cough experienced by cigarette smokers. Dr. DeHart stated that the literature never mentioned "mechanical means," such as lifting, as a potential cause of post-operative complications. He also testified that he consulted a thoracic surgeon who had not previously seen a sternal non-union due to physical activity. Dr. DeHart was of the opinion that Mr. Bumpus' sternum did not heal following the triple bypass surgery due to his predisposition to non-union caused by smoking and chronic cough. According to Dr. DeHart, when a person coughs the pectoral muscles and ribs attached to the sternum pull apart from the center of the sternum in order to expel the chest's contents. The stainless steel wires used to close a patient's sternum following open-heart surgery can withstand 20 kilograms of force. However, the typical person's cough can exert 50 kilograms of force across the chest wall. A person with COPD can exert up to 150 kilograms of force. Dr. DeHart further opined that work-related activity did not cause the deterioration of the surgical site.

Dr. David W. Gaw, a board certified orthopedic surgeon, reviewed Mr. Bumpus' medical records relating to his 2000 triple bypass surgery and sternal non-union. Although the Fifth Edition of the AMA Guides does not specifically address sternal non-union, Dr. Gaw assigned a permanent impairment of 10% to the body as a whole. Dr. DeHart testified that he accepted Dr. Gaw's calculation of 10% permanent impairment to the body as a whole for Mr. Bumpus' sternal non-union. However, Dr. DeHart testified that 2% of Mr. Bumpus's permanent impairment might be attributable to work-related activities while the remaining 8% is attributable to COPD.

Although Mr. Bumpus has permanent lifting and twisting restrictions, Dr. Carter, Dr. DeHart, and Dr. Gaw all agreed that he could return to work as a truck driver provided that he not be responsible for any tasks that involve lifting or twisting such as unloading the truck. A vocational expert testified for Mr. Bumpus that he lost access to 99.9% of the labor market previously available to him. A vocational expert testified for McKee Foods that Mr. Bumpus' vocational disability is 55%.

The trial court found that work-related activities did not cause Mr. Bumpus' sternal non-union following his triple bypass surgery; rather, Mr. Bumpus' more than fifty years of smoking and chronic cough caused the sternal non-union. The trial court further concluded that work-related activities did not aggravate or accelerate Mr. Bumpus' sternal non-union, nor did those activities cause an anatomical change. Accordingly, Mr. Bumpus' claim for medical and disability benefits was denied. He appeals that decision.

Mr. Bumpus contends that the trial court erred in finding that his sternal non-union was not a compensable injury. He contends that the non-union was caused by work-related activities, specifically the repetitive lifting and twisting required to unload his truck. Furthermore, Mr. Bumpus contends that work-related activities caused an actual progression or aggravation of his sternal non-union. For the reasons below, we disagree.

Standard of Review

Our standard of review of factual issues in a workers' compensation case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2005); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). When issues of credibility of witnesses and the weight to be given their in-court testimony are before the reviewing court, considerable deference must be accorded to the factual findings of the trial court. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 733 (Tenn. 2002); *See Rhodes v. Capital City Ins. Co.*, 154 S.W.3d 43, 46 (Tenn. 2004). When expert medical testimony differs, as it does in this case, it is within the trial judge's discretion to accept the opinion of one expert over another. *Hinson v. Wal-Mart Stores, Inc.*, 654 S.W.2d 675, 676-77 (Tenn. 1983). This Court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997). Questions of law are reviewed de novo with no presumption of correctness afforded to the trial court's conclusions. *Gray v. Cullom Machine, Tool & Die*, 152 S.W.3d 439, 443 (Tenn. 2004).

Analysis

In Tennessee, an employee is entitled to recover workers' compensation benefits from their employer if the employee suffers an injury "by accident arising out of and in the course of employment." Tenn. Code Ann. § 50-6-102 (2005). An accident occurs in the course of employment "if it occurs while an employee is performing a duty he or she was employed to do." *Fink v. Caudle*, 856 S.W.2d 952, 958 (Tenn. 1993). The accident arises out of the course of employment if there is a causal connection between the conditions of employment and the resulting injury. *Scott v. Shinn*, 171 Tenn. 478, 481 105 S.W.2d 103, 104 (1937). More simply stated, "in the course of" refers to time and place, while "arising out of" refers to causation. *Shubert v. Steelman*, 214 Tenn. 102, 107, 377 S.W.2d 940, 942 (1964).

The parties agree that Mr. Bumpus' 2000 heart attack, which required triple bypass surgery, was a non-compensable injury. The parties obviously disagree as to whether Mr. Bumpus' sternal non-union following surgery is compensable. It is well-settled that an employer takes the employee as he is and assumes the risk that the employee might aggravate a pre-existing condition. *Fink*, 856 S.W.2d at 958; *Rogers v. Shaw*, 813 S.W.2d 397, 399 (Tenn. 1991); *Brooks v. Gilman Paint Co.*, 208 Tenn. 595, 600, 347 S.W.2d 665, 667 (1967); *Swift & Co. v. Howard*, 186 Tenn. 584, 591, 212 S.W.2d 388, 391 (Tenn. 1948). A pre-existing condition becomes compensable if work-related activities cause an actual advancement, progression, or anatomical change in that condition. *Sweat v. Superior Indus., Inc.*, 966 S.W.2d 31, 32-33 (Tenn. 1998). However, a pre-existing condition is not compensable if the employee only experiences "increased pain or other symptoms." *Id.* at 31.

Therefore, for Mr. Bumpus' condition to be compensable, work-related activities must have caused an actual advancement, progression, or anatomical change of his sternum following surgery.

Before analyzing whether Mr. Bumpus' condition was actually advanced or progressed, we must first decide whether work-related conditions were a contributing cause of the sternal non-union. If they were not, McKee Foods is not liable. Dr. Carter, Mr. Bumpus' treating physician, opined that the cause of Mr. Bumpus' sternal non-union was "multi-factorial," and that Mr. Bumpus' work activities, specifically unloading boxes off his truck, were among those factors. However, Dr. Carter also admitted that smoking increases the risk that the sternum will not heal following surgery and that Mr. Bumpus' heavy smoking and chronic cough could have contributed to the non-union. Dr. DeHart was likewise clear that smoking and chronic cough are causes of non-union. He went further, however, and opined that physical activity is not a known cause of non-union following surgery. The gist of his testimony was that smoking and the chronic cough caused Mr. Bumpus' non-union, not his work activities.

Given the conflicting expert medical testimony from Dr. Carter and Dr. DeHart, we cannot say that the evidence preponderates against the trial court's ruling that Mr. Bumpus' sternal non-union following open-heart surgery was caused by fifty years of heavy smoking and a chronic cough rather than work-related activities. Accordingly, Mr. Bumpus' sternal non-union is not a compensable injury and all other issues on appeal are moot.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to James M. Bumpus and his surety, for which execution may issue if necessary.

WALTER C. KURTZ, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

McKEE FOODS CORPORATION v. JAMES M. BUMPUS

**Circuit Court for Sumner County
No. 25279**

No. M2007-02467-SC-WCM-WC - Filed - December 1, 2008

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by James M. Bumpus, pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to James M. Bumpus, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Koch, J., not participating